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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

NO. 586

AERO MAYFLOWER TRANSIT COMPANY,

APPELLANT,

versus

GEORGIA PUBLIC SERVICE COMMISSION ET AL.

APPELLEES.

REPLY BRIEF OF APPELLANT

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THE STATUTE INVOLVED

When this suit was filed the Motor Carrier Act approved March 31, 1931, (Our brief 17, 18, R. 14, 15, 32) section one, in defining the carriers included used the words, "whether or not common carriers." The Motor Common Carrier Act approved August 27, 1931, (R. 33 Acts 1931, 199-213) was at first claimed by Appellees to "be applicable to plaintiff" (R. 2, end page). The two Acts being related were copied as Exhibits to the original petition, the Motor Carrier Act as A (R. 13 ff.) and the Common Carrier Act as B (R. 33, ff.).

The Supreme Court of Georgia in this case definitely held that the Motor Common Carrier Act was inapplicable to Appellant (R. 48, 49), and later when the Act was codified "common carriers" were excluded. Therefore, the statute involved here is the Motor Carrier Act limited to contract carriers. (See Appendix to our original brief herein, pp. 17 ff.).

THE STATUTE CODIFIED

The Georgia Legislature in 1933 adopted the Code of 1933 but it was not printed nor effective until proclaimed by the Governor and adopted by the Legislature, February 14, 1935, after our original brief herein was filed. (See Act, February 14, 1935, Appendix 1 hereto). In this Code the Act here involved has been changed in some respects. (For details of such changes see Appendix 2.)

CONSTRUCTION OF ACT

Except the conclusion that the Act involved was limited to contract carriers and that the Motor Common Carrier Act has no application to Appellant's business, there has been no judicial interpretation or construction of the statute here under attack. There is room for difference of opinion as to the application of the sections relating to Public Convenience and Necessity (Act, Sections 4, 5, 6, 7, 17, 27, 28, and 31). Sections 8, 9, 10, 12, 14 and 19 do not apply to interstate common carriers (See Sec. 30, R. 46, Code 68-633) but no such exclusion is in the Motor Carrier Act (R. 28, Code 68-525). The criminal provisions, Section 20, the safety regulations, Section 24, and the hours of service, Section 25, are not limited to interstate operators. Possibly all sections except Section 12 as changed by the Code of 1933 apply to Appellant but certainly none is binding on the classes exempted by Section 2. Appellant complied with the law except as to the tax (R. 3), the rate provisions, and a certificate of Public Convenience and Necessity as to which compliance has not been demanded by the Commission. Since this appeal the Commission has changed its regulations and no longer requires interstate carriers to state their routes of travel as provided in paragraph c of Section 5, but still insists on collecting the tax and on all other provisions except as just stated. These unequal requirements evidence an intention to burden Appellant and interstate commerce and show the arbitrary character of the Act as a whole.

REPLY TO APPELLEES' BRIEF

PLEADINGS

It is contended by Appellees, their brief, page 9, that the definition of "Agricultural products" was not pleaded. The statute is copied, the statute including the fee required by Section 18 is claimed to be void on this and other grounds and the exemption of "agricultural products" alleged (R. 9). As the statute defined "agricultural products" it was not necessary to restate that definition. The case was decided on general demurrer with no ruling on the special demurrers (R. 47). The facts as to exemptions and burdens being pleaded, the statute copied, and the prayer being for an adjudication that

the whole statute was void (R. 13), the general demurrer should have been overruled. The prayer, in part, reads:

> "4. That the entire Motor Carrier Act of 1931, set out as Exhibit A to the petition, be held to be unconstitutional, null and void because of the exemptions therein;" (R. 13).

DECISIONS OF THIS COURT

We shall herein make brief reference to relevant cases, some of which were relied on by Appellees and not discussed in our original brief.

PACKARD v. BANTON, 264 U. S. 140

In this case a classification distinguishing as to safety regulations between uses for private purposes and as a business, and between large and small cities was sustained. This Court, in an opinion announced by Mr. Justice Sutherland, showed (pp. 143, 144) substantial and valid reasons for the classification. In the instant case both the regulated and the exempted classes use the highways "for the purposes of gain," and the only basis for the classification giving an advantage to the exempted class is the ownership of the commodities transported.

BUCK v. KUYKENDALL, 267 U. S. 307

Mr. Justice Brandeis, delivering the opinion of the Court holding the statute there involved to be repugnant to the Federal Constitution, described it as determining

> "not the manner of use but the persons by whom the highways may be used" (P. 315).

In the case now for decision the manner of the use by the exempted class is not different from the use by Appellant and the exempted class has opportunity for a greater use than is possible to an interstate carrier. The distinction here is as between persons engaged in exactly similar businesses and in the same manner, one hauling for one class and the other for another. The title of the commodity, not the manner of the use of the highways, is made the test of whether or not there shall be regulation and taxation. This is, as said in the opinion of thisCourt,

> "regulation not of the use * * * but of interstate commerce" (p. 316).

QUAKER CITY CAB CO. v. PENNSYLVANIA, 277 U. S. 389

A taxing statute was attacked in the case cited as denying the equal protection of the laws and in an opinion delivered by Mr. Justice Butler the claimed basis for the discriminatory classification was stated:

> "The character of the owner is the sole fact on which the distinction and discrimination are made to depend." (P. 402).

If "owner of the commodity" be substituted for "owner" in the above quotation the essential basis of Appellant's case will be described. Ownership of carrier was there held not "based on a real and substantial difference" and the same can be said of ownership of commodity.

CARLEY & HAMILTON v. SNOOK, 281 U. S. 66

This case is relied on by Appellees but it should be remembered that it concerned only intrastate commerce (p. 71.) Mr. Justice Stone who delivered the opinion of the Court was careful to note that cases under the Commerce Clause of the Constitution require courts to "ascertain whether a forbidden burden is imposed on interstate commerce" and "may inquire whether the tax bears some reasonable relation to the use of the State facilities." The rule in the *Quaker City Cab Case* above was stated and many similar decisions citied (p. 71), but the intrastate application of the statute there involved made inapplicable this general rule on which we rely here where Appellant is engaged solely in interstate commerce.

BEKINS VAN LINES v. RILEY, 280 U. S. 80

This case is relied on by Appellees. In this case a different and claimed discriminatory method of taxing intrastate haulers was attacked. There Mr. Justice McReynolds delivered the opinion of the Court, pointed out the "marked distinction" between common and private carriers which justified "placing common carriers * * * in a special class" and said that probably a "regular and frequent" use "will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers." (P. 82). This obvious distinction made by the learned Justice does not exist

here, where neither the exempted owner nor Appellant is a common carrier. Here the use of the highway by Appellant is more "occasional" and therefore under the rule quoted above less destructive than the use made by some of the excepted class.

ALWARD v. JOHNSON, 282 U. S. 506

Here the conclusion follows the case next above and as in that case the opinion was delivered by Mr. Justice McReynolds who stated the fact that there was no "interference with interstate commerce" (P. 513).

SPROLES v. BINFORD, 286 U. S. 374

The exemptions from the weight law involved in this case relied on by Appellees was as stated by the State Court and referred to by Mr. Chief Justice Hughes who delivered the opinion, applicable:

> "only to farm machinery and not trucks used as an incident to the business of farming" (P. 392).

As the statute was thus construed the Chief Justice said that

> "the movement (of exempted vehicles) would be relatively temporary and infrequent." (P. 392).

Later in the opinion it was pointed out that the statute was not "a denial of the use of the highways to one class of citizens as opposed to another" (P. 394). Here there is a denial of equal protection because a numerous "class of citizens" may hire motor carriers to haul their products and such carriers are exempt from the regulations and taxes here under attack although Appellant hired by another "class of citizens" owning the same kinds of commodities transported in the same way is denied the exemptions. The carrying capacity of Appellant's cars is less for all its trucks than 10,000 pounds (R. 2).

STEPHENSON v. BINFORD, 287 U. S. 251

The claim of discrimination in this case was denied and Mr. Justice Sutherland delivering the opinion of the Court found that as the statute was construed and applied there was "no ground upon which to base a complaint" of discrimination (p. 278).

This case is citied by Appellees in support of the claim, not by us contested, that states may regulate for the safety of the public, truck haulers in interstate commerce. The general rule was stated by Mr. Justice Brandeis (pp. 95, 96) but (p. 97) he said:

> "Nor is there any suggestion that the classification operates to favor intrastate over interstate carriers."

In the case now before the Court there is not only suggestions but facts showing a preference to intrastate operators. (See p. 13 of petition, record pp. 6, 7). The facts here also show a purpose to burden all interstate and intrastate haulers who serve others than the exempted class of shippers.

As illustrative of this contention, we may, we think, properly refer to an unprinted but official record in the office of the Public Service Commission of Georgia. That was a report made January 1st, 1933, for the purpose of getting the facts with reference to the different classes of motor vehicles. A survey was made at twenty-five strategic points, these points being selected by the Commission as representative of the different kinds of motor vehicles operating in the State. The report is extensive, but among other things sets out the number

"Private Motor Trucks.....12293" and
"Motor Trucks for Hire..... 449"

This test does not indicate that compensation for use of the highways was the legislative purpose. Not only are private motor trucks unregulated under the statute here attacked but trucks hired by a class are exempted.

In *Connally v. Union Sewer Pipe Co.*, 184 U. S. 540 there were exemptions similar to those here and what was said in describing them applies here. The Court (p. 564) said:

> "two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves

or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws?"

In the *Connally Case* there was stated the rule which applied here will annul the whole of the statute under attack. The rule (p. 565) is:

> "the act, if it stands, will apply to agriculturists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand. Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protections of the laws * * *"

CONCLUSION

There is here presented a complete scheme of regulation and a tax substantial in amount, from which there are more extensive exemptions than those which heretofore have been held to produce a denial of the equal protection of the law, and a burden on interstate commerce.

The claimed reason for the tax is to cover the cost of policing and to compensate for the use of the State's highways. Yet those who use the highways more regularly and more extensively than Appellant, are exempted. Others hauling as a regular business the same commodity as Appellant are free, while Appellant is bound. This, where there is only one difference, the ownership of the property. The weight limitation of the exempted class is not a difference as Appellant uses no

truck that has a rated capacity in excess of 10,000 pounds (R. 2, par. 5 petition). Hauling A's property as a business and being paid therefor, the business is unregulated and, as to the tax here, untaxed; hauling the same commodity for B over the same highway for a similar payment, in a similar truck, the business is taxed and regulated. If this be permissible, does the equal protection and commerce clauses have any meaning?

Respectfully Submitted,

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APPENDIX 1

An Act

"To adopt and make of force the Code of Laws of the State of Georgia known as the Code of Georgia of 1933, as approved by the Code Commission appointed pursuant to a joint resolution approved August 27, 1929, and as provided for by an Act approved March 24, 1933, and as made effective by proclamation of the Governor as of and upon January 1, 1935; and for other purposes.

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

"Section 1. That the Code of Laws of the State of Georgia which was prepared under the direction of the Code Commission created by joint resolution approved August 27, 1929, and composed of Honorable S. Price Gilbert, Associate Justice of the Supreme Court, Honorable Nash R. Broyles, Chief Judge of the Court of Appeals, Honorable George W. Stevens, Reporter of the Supreme Court, the Speaker of the House of Representatives and the President of the Senate, and which was approved by said Commission after it was so prepared, and which was published and became effective January 1, 1935, by proclamation of the Governor, entered pursuant to the Act approved March 24, 1933, and which is known and described as the Code of Georgia of 1933, *be and the same is hereby adopted and made of force as the Code of Georgia, having the force and effect of statutes enacted by the General Assembly of this State,* Said Code shall be known as the Code of Georgia of 1933.

"Section 2. *That all laws and parts of laws in conflict with this Act, except those enacted since January 1, 1935, be and the same are hereby repealed.*"

Approved:

(Signed) *EUGENE TALMADGE*

Governor

This 14 day of Feb. 1935

APPENDIX 2

Title 68 of this Code includes all regulations relating to motor carriers, and Chapters 5 and 7 of this title relate to motor contract carriers. The crime sections affecting all motor carriers are in Chapter 9 of this title.

For convenience of the Court we give the sections of that Code, relating them to the Act and stating such differences as exist. We refer to the Act as printed in our brief, giving the pages where a particular section may be found.

Act	Code Sections	Changes, if any
SECTIONS		
Title, p. 17	Omitted	
Sec. 1, p. 18	68–501	With common carrier omitted.
Sec. 2, p. 18	68–502	Excepts "common carrier."
Sec. 3, p. 20	68–503	Excepts "common carrier."
Sec. 4, p. 20	68–504	Omitting paragraph c and adding paragraph g making 7 years the life of a "certificate." See Sec. 28 of Act.
Sec. 5, p. 22	68–505	Omitting paragraph d.
Sec. 6, p. 22	68–507	
Sec. 7, p. 23	68–509	
Sec. 8, p. 23	68–510	Omits some words but meaning not changed.
Sec. 9, p. 24	68–511	For penalty, see 68–9900.
Sec. 10, p. 24	68–512	
Sec. 11, p. 24	68–513	
Sec. 12, p. 25	68–617	Limited to common carriers.
Sec. 13, p. 25	68–514	
Sec. 14, p. 25	68–515	
Sec. 15, p. 26	68–516	
Sec. 16, p. 26	68–517	
Sec. 17, p. 26	68–516	
Sec. 18, p. 26	68–518	
Sec. 19, p. 27	68–519	
Sec. 20, p. 28	68–9909, 9910 and 9913, criminal	

Act	Code Sections	Changes, if any
Sec. 21, p. 28	68–520	
Sec. 22 and 23, p. 29	Omitted	
Sec. 24, p. 29	68–521	
Sec. 25, p. 30	68–522	
Sec. 26, p. 30	68–523	
Sec. 27, p. 30	68–630	
Sec. 28, p. 30	68–524	Paragraph g, Sec. 68–504 taken from this Section.
Sec. 29, p. 31	Omitted	
Sec. 30, p. 31	68–525	
Sec. 31, p. 31	68–526	
Sec. 32, 33, p. 31 and 32	Omitted and 68–527 added	Making chapter cumulative.

HISTORY OF LEGISLATION

The legislative journals and Acts show that after the Act of March 31, 1931, applicable both to common and contract carriers and here involved was passed and at a subsequent session of the legislature there were introduced two bills. One of these was made applicable to contract carriers only; the other, Exhibit B to the petition herein (R. 33 ff.) applied to common carriers only.

The first of these bills failed of passage, the second became the Act of August 27, 1931.

The failure to pass the contract carrier bill in August, 1931, left the original and confused Act of March 31, 1931, as the law applicable to contract carriers.